

Supreme Court, U.S.
E I L E D
MAY 29 1987
JOSEPH F. SPANIOLO, JR.
CLERK

3

CASE NO. 86-1474

IN THE SUPREME COURT OF
THE UNITED STATES

OCTOBER TERM 1986

ELLIS S. RUBIN,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

**BRIEF OF RESPONDENT IN
OPPOSITION TO PETITION FOR
WRIT OF CERTIORARI TO THE SUPREME
COURT OF FLORIDA**

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

**RICHARD L. POLIN
JULIE S. THORNTON**
Assistants Attorney General
Department of Legal Affairs
401 N.W. 2nd Avenue (Suite 820)
Miami, Florida 33128
(305) 377-5441

84977

QUESTION PRESENTED

WHETHER ADJUDICATING THE PETITIONER, AN ATTORNEY, IN DIRECT CRIMINAL CONTEMPT FOR REFUSING TO OBEY AN ORDER OF THE COURT THAT HE CONTINUE TO REPRESENT A CLIENT WHO APPARENTLY INSISTED ON TESTIFYING FALSELY AT TRIAL AFTER PETITIONER WAS ALLOWED TO APPEAL THE DECISION OF THE TRIAL COURT AND WAS INFORMED BY THE STATE APPELLATE COURT OF THE APPROACH TO TAKE IN FURTHER REPRESENTING THE CLIENT VIOLATED ANY CONSTITUTIONAL OR DUE PROCESS RIGHTS ENJOYED BY PETITIONER?



TABLE OF CONTENTS

	<u>PAGE</u>
QUESTION PRESENTED.....	1
TABLE OF CITATIONS.....	1b-1d
PREFACE.....	2
OPINION BELOW.....	3
JURISDICTION.....	4
CONSTITUTION, AND STATUTORY AND STATE REGULATIONS INVOLVED.....	5
STATEMENT OF THE CASE AND FACTS.....	6-23
CONCLUSION.....	24
CERTIFICATE OF SERVICE.....	25

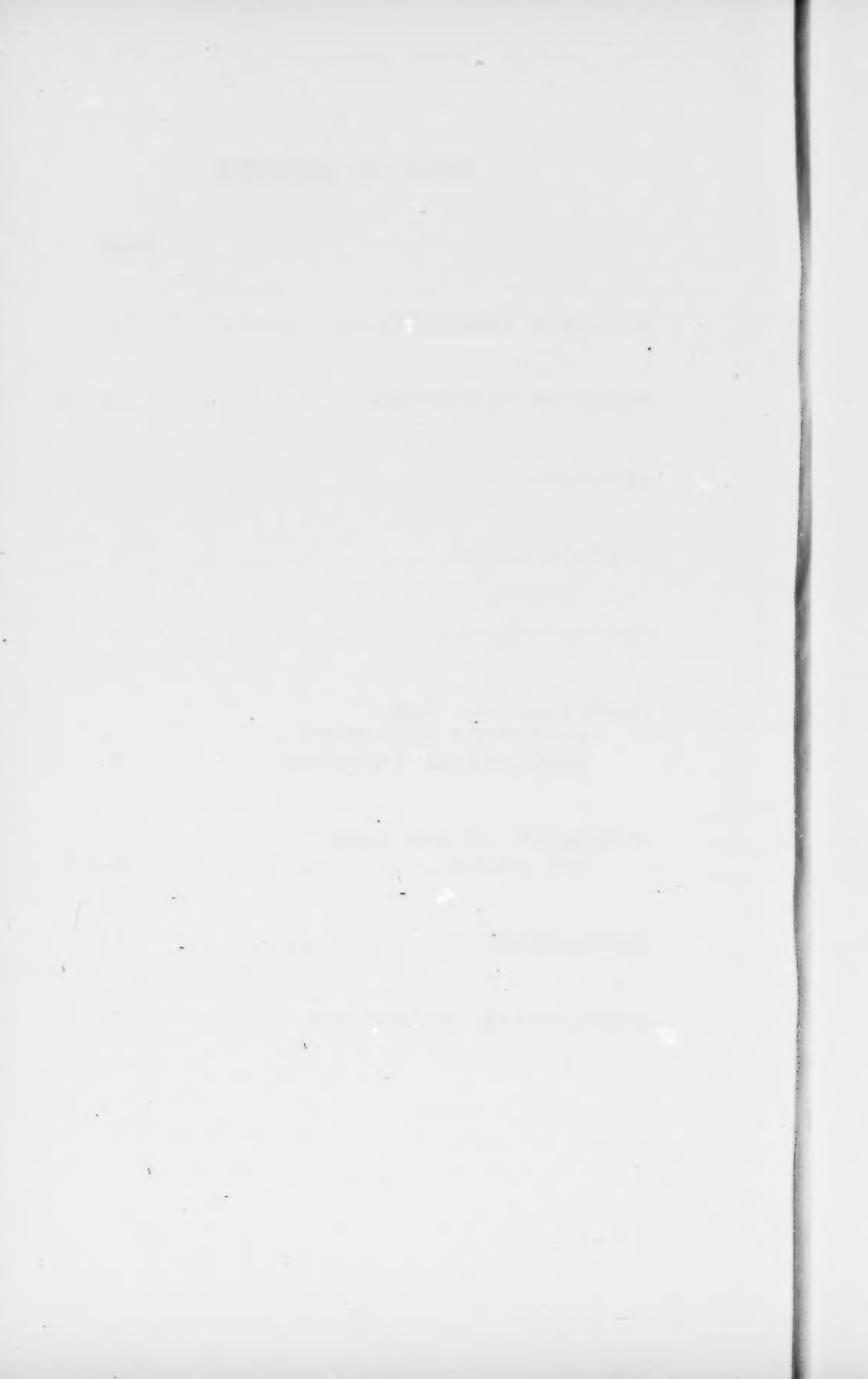


TABLE OF CITATIONS

UNITED STATES CASES	PAGE
Banks v. California, 395 U.S. 708, 89 S.Ct. 1901, 23 L.Ed.2d 653 (1969).....	17
Martin v. Walton, 368 U.S. 25, 82 S.Ct. 1, 7 L.Ed.2d 5, <u>rev. den.</u> , 368 U.S. 945, 82 S.Ct. 376, 7 L.Ed.2d 341 (1961).....	13
Mathews v. Huwe, 269 U.S. 262, 46 S.Ct. 108, 70 L.Ed.2d 266 (1925).....	17
McNabb v. United States, 318 U.S. 332, 87 L.Ed.2d 819, 63 S.Ct. 608, <u>rev. denied.</u> , 319 U.S. 784, 63 S.Ct. 1322, 87 L.Ed.2d 1727 (1943)..	13
Moore v. Illinois, 408 U.S. 786, 92 S.Ct. 2562, 33 L.Ed.2d 706 (1972).....	14
Nix v. Whiteside, U.S. _____, 106 S.Ct. 988, 89 L.Ed.2d 123 (1986).....	14, 16 22



TABLE OF CITATIONS
CONTINUED

Stratton v. Stratton,
 239 U.S. 55 (1915), 36 S.Ct. 26,
 60 L.Ed 142, (1915)..... 17

Street v. New York,
 394 U.S. 576, 89 S.Ct. 1354,
 22 L.Ed 2d 572, (1969)..... 21

The New York Times Co., v. Jascavich,
 439 U.S.1317, 99 S.Ct. 6,
 58 L.Ed.2d 25 (1978)..... 13

Webb v. Webb,
 451 U.S. 493 , 101 S.Ct. 1889,
 68 L.Ed.2d 392 (1981)..... 14

UNITED STATES CODE

28 U.S.C. §1257(3)..... 4
 12,
 13

OTHER AUTHORITIES

Rubin v. State,
 490 So.2d 1001
 (Fla. 3d DCA 1986)..... 9
 10

Rubin v. State,
 490 So.2d 1002
 (Fla. 3d DCA 1986),
pet. for review denied,
So.2d _____,
 (Fla 1986)..... 3

OTHER AUTHORITIES
CONTINUED

Sanborn v. State,
474 So.2d 309
(Fla. 3d DCA 1985)..... 7,
8,
17
22,

PREFACE

The Petitioner, Ellis S. Rubin, was the defendant in the trial court, the Appellant in the District Court of Appeal of Florida, Third District, and the Petitioner in the Supreme Court of Florida. The Respondent, the State of Florida, was the prosecution in the trial court, the Appellee in the District Court of the Appeal of Florida, Third District and the Respondent in the Supreme Court of Florida. The symbol "R. App." shall be used to designate reference to the Respondent's Appendix. The symbol "P. App" shall be used to designate reference to Petitioner's Appendix.

OPINION BELOW

The opinion of the District Court of Appeal of Florida, Third District, is reported as Rubin v. State, 490 So.2d 1002 (Fla. 3d DCA 1986), pet. for review denied, ____ So.2d ____ (Fla. 1986). (P. App. 6).

JURISDICTION

The jurisdiction of this Court is sought by Petitioner under 28 U.S.C. §1257(3), based upon his contentions that the State of Florida has deprived him of rights secured by the Constitution of the United States. Respondent would urge that this Court lacks jurisdiction to consider Petitioner's claims under 28 U.S.C. §1257(3), as Petitioner's claims do not raise any federal constitutional issues and involve only questions of state law. Respondent will elaborate on the lack of jurisdiction in the argument section of this brief.

CONSTITUTION, STATUTORY AND
STATE REGULATIONS INVOLVED

Petitioner has set forth at page 3 of the petition the constitutional provisions, state regulations, and state statutes which are allegedly involved in the instant petition.

STATEMENT OF THE CASE AND FACTS

On April 29, 1985, the Petitioner, who was representing one Russell Sanborn on the charge of first degree murder, filed a motion to withdraw as counsel. (R. App. 1-14). The essence of the motion to withdraw, which was filed on the eve of trial, was that Petitioner's client insisted upon testifying falsely or presenting false evidence at trial and, therefore, Petitioner sought to be released from representing Sanborn. After a hearing, the trial court denied the motion. In its order denying the petition for leave to withdraw, the trial court noted that Petitioner was the fourth attorney appointed to represent Sanborn. The court determined that "every ethical lawyer appointed to

represent defendant [would] be placed in the same position present defense counsel has been placed." (P. App. 22-28). Accordingly, the trial court sought to balance the "defendant's rights with the need to proceed in an orderly fashion." (P. App. 27). The trial court suggested a method whereby the defendant would present his testimony in narrative form without assistance of counsel. (P. App. 22-28).

Petitioner then filed a petition for common law certiorari in the Third District Court of Appeal seeking to review the order of the lower court denying his motion to withdraw. (R. App. 15-39). The district court denied the petition for writ of certiorari on July 16, 1985. Sanborn v. State, 474

So.2d 309 (Fla. 3d DCA 1985). (P. App. 36-64). While recognizing the ethical obligations of attorneys which prohibit the knowing use of fraudulent, false or perjured testimony, the district court clearly set forth ways by which Petitioner could go forward as counsel for Sanborn while preserving the sanctity of the tribunal and the ethical standards Petitioner has vowed to uphold. Sanborn v. State, supra. (P. App. 36-64).

Petitioner filed motions for rehearing and rehearing en banc of the district court order, which were denied. He sought no further review of the order.

Upon return to the trial court, Petitioner again sought to withdraw as counsel on the same ground. The trial court again denied the motion to withdraw and ordered Petitioner to proceed. Petitioner refused and an order was entered finding Petitioner in direct criminal contempt of court for refusing to comply with the court's order. (P. App. 29-35).

Petitioner filed an appeal from the contempt order in the Third District Court of Appeal. The appellate court affirmed the order of the trial court. Rubin v. State, 490 So.2d 1001, (Fla. 3d DCA 1986). (P. App. 6-21). Petitioner began serving the 30-day sentence imposed for the finding of contempt on July 11, 1986. On that same date,

Petitioner filed a petition for writ of habeas corpus with the Florida Supreme Court alleging that he was illegally confined, imprisoned, and restrained.

The Florida Supreme Court issued an order immediately releasing Petitioner on his own recognizance and ordering Respondent to show cause why relief should not be granted.

In addition, the Petitioner filed a petition to invoke the discretionary jurisdiction of the Supreme Court to review Rubin v. State, 490 So.2d 1001 (Fla. 3d DCA 1986). On December 19, 1986, the Florida Supreme Court entered an order denying the Petition for Writ of Habeas Corpus and an order denying review of Rubin v. State, supra. (R.

App. 40-43). Petitioner filed a motion for rehearing of the denial of the Petition for Writ of Habeas Corpus on December 31, 1986.

The motion for rehearing was denied on January 16, 1987. (R. App. 44-45). Petitioner completed serving the sentence imposed. Petitioner then filed a Petition for Writ of Certiorari to the Supreme Court of Florida. This brief is filed in opposition to the granting of the writ.

REASONS IN OPPOSITION TO THE
GRANTING OF WRIT

ADJUDICATING THE PETITIONER, AN ATTORNEY, IN DIRECT CRIMINAL CONTEMPT FOR REFUSING TO OBEY AN ORDER OF THE COURT THAT HE CONTINUE TO REPRESENT A CLIENT WHO APPARENTLY INSISTED ON TESTIFYING FALSELY AT TRIAL AFTER PETITIONER WAS ALLOWED TO

APPEAL THE DECISION OF THE TRIAL COURT AND WAS INFORMED BY THE STATE APPELLATE COURT OF THE APPROACH TO TAKE IN FURTHER REPRESENTING THE CLIENT DID NOT VIOLATE ANY CONSTITUTIONAL OR DUE PROCESS RIGHTS ENJOYED BY PETITIONER.

Petitioner has failed to raise a federal constitutional issue in either this Court or the State courts, and jurisdiction is therefore lacking under 28 U.S.C. §1257(3).

Petitioner indicates in his Petition that the main issues to be resolved in this case are: "What should the lawyer do when his criminal client intends to testify falsely in State Court? And, where ethics and a Court order collide, must a lawyer be jailed for choosing ethics?" (Petitioner's Petition for a Writ of Habeas Corpus, p. i). The issues presented are not federal constitutional issues. As such,

jurisdiction does not exist under 28 U.S.C. §1257(3).

28 U.S.C. §1257(3) permits this Court to review "[f]inal judgments . . . rendered by the highest court of a State in which a decision could be had" This Court has held that "it is only final judgments with respect to issues of federal law that provide the basis for our appellate jurisdiction with respect to state-court cases." The New York Times Co., v. Jascavich, 439 U.S. 1317, 1318, 99 S.Ct. 6, 58 L.Ed.2d 25, 28 (1978). See also, Martin v. Walton, 368 U.S. 25, 82 S.Ct. 1, 7 L.Ed.2d 5, rev. den., 368 U.S. 945, 82 S.Ct. 376, 7 L.Ed.2d 341 (1961); McNabb v. United States, 318 U.S. 332, 340, 87 L.Ed.2d 819, 63 S.Ct. 608, rev. den., 319 U.S.

784, 63 S.Ct. 1322, 87 L.Ed.2d 1727 (1943); Moore v. Illinois, 408 U.S. 786, 799, 92 S.Ct. 2562, 33 L.Ed.2d 706, 716 (1972). In addition, the record must clearly reflect "that the federal claim was adequately presented in the State system." Webb v. Webb, 451 U.S. 493, 496, 101 S.Ct. 1889, 68 L.Ed.2d 392, 397 (1981). The issues presented by Petitioner meet none of the above jurisdictional requisites.

In Nix v. Whiteside, ____ U.S. ____, 106 S.Ct. 988, 89 L.Ed.2d 123 (1986), this Court recognized that it is "the State's proper authority to define and apply the standards of professional conduct applicable to those it admits to practice in its courts." Indeed, Justice Brennan made clear in his con-

curing opinion that the question of legal ethics is not a constitutional question. Justice Brennan wrote:

This Court has no constitutional authority to establish rules of ethical conduct for lawyers practicing in the state courts. Nor does the Court enjoy any statutory grant of jurisdiction over legal ethics

Accordingly, it is not surprising that the Court emphasizes that it "must be careful not to narrow the wide range of professional conduct acceptable under the Sixth Amendment so restrictively as to constitutionalize particular standards of professional conduct and thereby intrude into the State's proper authority to define and apply the standards of professional conduct applicable to those it admits to practice in its courts." Ante, at _____. I read this as saying in another way that the Court cannot tell the States or the lawyers in the states how to behave in their courts, unless and until federal rights are violated.

Nix v. Whiteside, supra at _____.
(emphasis in original).

Accordingly, it is clear beyond peradventure that it is left to the State's to regulate the conduct of the attorneys that practice within each State. As such, rules of ethics of a particular state and the regulation of attorney conduct within that state are the sole province of the state courts and do not present questions of constitutional dimension. The wisdom or propriety of the method sanctioned by the Florida Bar and the Florida courts for dealing with a client who intends to commit perjury, which is the essence of

the instant Petition, simply does not present a federal question.¹

Moreover, Petitioner never sought review in the Supreme Court of Florida of Sanborn v. State, supra, the decision of the District Court of Appeal which sets forth the procedure for dealing with a client who intends to commit perjury. Having failed to seek review of that decision in the State Court of last

¹ This brief only concerns the issue of whether this Court should accept jurisdiction of the case for certiorari review. Accordingly, Respondent will refrain from arguing the soundness of the resolution approved by

resort, he is precluded from seeking review of that decision in this court. Stratton v. Stratton, 239 U.S. 55 (1915), 36 S.Ct. 26, 60 L.Ed. 142, (1915); Mathews v. Huwe, 269 U.S. 262, 46 S.Ct. 108, 70 L.Ed. 266 (1925); Banks v. California, 395 U.S. 708, 89 S.Ct. 1901, 23 L.Ed.2d 653 (1969).

The sole remaining question, therefore, is whether Petitioner has properly raised a substantial federal question concerning his conviction for criminal contempt based upon his refusal to comply with a direct order of the court enforcing a procedure approved by

the Florida courts for dealing with a client who intends to commit perjury.² As will be demonstrated below, the answer to this question is in the negative.

In each and every pleading filed in the State courts, petitioner argued that the order of contempt was erroneously entered because the method prescribed by the courts and regulations for dealing with a client who intends to commit

² The District Court of Appeal also held that the solution proposed would not violate the ethical standards that Petitioner is bound to uphold as a

perjury was improper. Indeed, Petitioner merely rehashed the arguments previously made subsequent to the denial of his motion to withdraw. As noted earlier, these contentions do not raise a substantial federal question which would warrant review under §1257. The only time Petitioner even alleged a violation of a right claimed under the constitution was in his appeal to the district court from the contempt conviction. In said brief, Petitioner alleged, inter alia, that the trial court denied him of his constitutional right to due process of law where he was not furnished adequate notice and hearing prior to his contempt conviction. (R. App. 46-48). The claim, which was raised in only cursory fashion, was never decided by the

district court of appeal. (P. App. 6-21). More importantly, however, Petitioner never presented the claim to the Florida Supreme Court for review. Indeed, Petitioner does not now contend that his due process rights were violated based upon a lack of notice and hearing. Accordingly, the only presentation of a federal issue in the state courts was never presented to the highest court of the state nor presented to this court as a basis for review. This Court has held that "when, as here, the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of presentation in the state courts, unless the aggrieved party in this court can affirmatively show to the contrary." Street v. New York, 394 U.S.

576, 582, 89 S.Ct. 1354, 22 L.Ed.2d 572, 579 (1969). This Petitioner has not done., Indeed, he cannot do so.

In his brief, Petitioner attempts to set forth various federal questions which were allegedly raised in the state courts. (Petitioner's brief, p. 12-20). A review of this section of Petitioner's brief reinforces the Respondent's position that Petitioner has never raised a federal question in the state courts. Petitioner merely cites to various United States Supreme Court decisions which were cited in the briefs filed in the state courts and the decisions of the state courts. Mere reference to a United States Supreme Court decision does not establish, however, that the state court based its

decision upon a federal question. For example, Petitioner states that the Third District Court of Appeal of Florida "specifically refers" to Nix v. Whiteside, supra, in its decision in Sanborn v. State, supra. Petitioner asserts that such reference "indicates consideration of the federal questions involved in Nix by the court in deciding Sanborn." Petitioner's brief, p. 12. This assertion is clearly erroneous. The federal question in Nix v. Whiteside was whether the defendant had been denied effective assistance of counsel guaranteed by the Sixth Amendment. There is no such question in the instant case. Indeed, Petitioner has done nothing more than cite to cases referred to by or in the state courts in resolving the State question of what is

the proper solution for dealing with a client who intends to commit perjury.

Mere reference to cases which were decided by this court clearly does not establish that Petitioner "presented" or that the state court "decided" the constitutional issues resolved therein.

CONCLUSION

Based upon the foregoing analysis, Respondent would urge that this court refuse to invoke certiorari jurisdiction in that the petition does not raise any substantial federal constitutional issues.

Respectfully submitted

ROBERT A. BUTTERWORTH
Attorney General

JULIE S. THORNTON
Assistant Attorney General

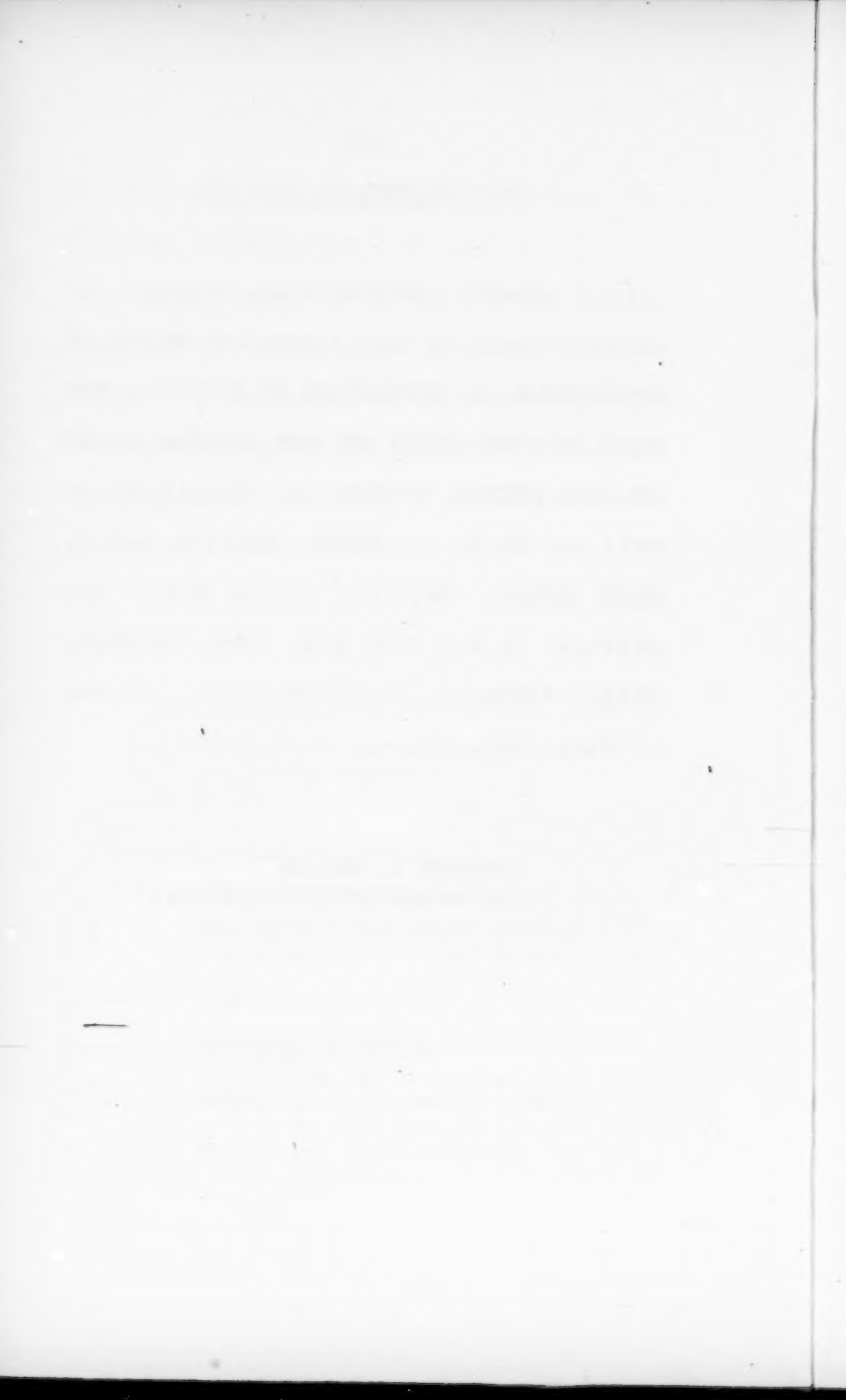
RICHARD L. POLIN
Assistant Attorney General
Department of Legal Affairs
401 N.W. 2nd Avenue (Suite 820)
Miami, Florida 33128
(305) 377-5441

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES** was furnished by mail to **ELLIS S. RUBIN, Esquire** and **I. MARK RUBIN, Esquire**, Ellis Rubin Law Offices, P.A., 265 N.E. 26th Terrace, Miami, Florida, 33137 on this ____th day of May, 1987.

RICHARD L. POLIN
Assistant Attorney General

/dmc



APPENDIX TO
BRIEF OF RESPONDENT ON JURISDICTION



A-1

IN THE CIRCUIT COURT OF
THE 11TH JUDICIAL
CIRCUIT, IN AND FOR DADE
COUNTY, FLORIDA

CASE NO. 84-010908

STATE OF FLORIDA,
Plaintiff

vs.

RUSSELL J. SANBORN,

Defendant.

PETITION FOR
LEAVE TO
WITHDRAW

ELLIS RUBIN LAW OFFICES, P.A., by
and through ELLIS S. RUBIN, ESQUIRE,
petitions this Court for leave to
withdraw as counsel of record for the
Defendant, RUSSELL J. SANBORN, in this
and all other causes within the
jurisdiction of this Court as follows:

FACTUAL BACKGROUND

1. Petitioner has been admitted to
practice law in Florida since 1951; he

has participated in thousands of jury and non-jury civil, criminal and administrative trials and appeals in the past 34 years while rejecting thousands of others. He is thoroughly familiar with and is morally, ethically and legally bound by the Florida Code of Professional Responsibility (including Canons, Ethical Considerations and Disciplinary Rules) as promulgated by the Supreme Court of Florida.

2. On February 11 and 13 and again on March 9, 1985, the mother of this Defendant wrote poignant letters to Petitioner -- followed up by phone calls and personal interviews -- pleading for Petitioner to enter this case as defense counsel. A woman with no income other than from selling vegetables and from

disability checks, Holly Sanborn even offered to "sign a contract to pay \$100.00 a month for the rest of my life. . . ." to "Please help this young man, he is not guilty--."

3. After preliminary investigation, interviews with the Defendant, and a refusal by the Court to be appointed, Petitioner agreed on March 12, 1985 to represent the Defendant without any fee. The Defendant had previously been declared indigent for costs. Petitioner's Motion for Substitution of Counsel was granted by Court Order on March 19, 1985, at which time trial-by-jury was set for April 29, 1985. The State seeks the death penalty for a First Degree Murder Count.

4. Four lawyers and two secretaries have devoted almost full time for the past 42 days in preparing for trial for this Defendant. A total of about 261 hours -- including the taking of over 25 depositions, retention of experts, research, interviews, etc. -- have been devoted to discovery.

5. Beginning on Monday, April 22, 1985, Petitioner has been able to put together, interpret and place before the Defendant the facts in this case. On Thursday and Friday, April 25 and April 26, respectively, the Defendant and his mother have confided new details and heretofore unknown explanations to Petitioner based on witness depositions and physical evidence recently produced.

6. Because of the caveat of EC 2-32, Code of Professional Responsibility, calling for counsel "to minimize the possible adverse effect on the rights of his client and the possibility of prejudices to his client as a result of his withdrawal", and the additional prohibitions of the Code's DR 4-101 (B)(1) whereby Petitioner "shall not knowingly reveal a confidence or secret of his client," Petitioner cannot further detail Paragraph 5 above.

7. The Defendant herein has properly instructed Petitioner as to what plea should be entered in this cause and has attempted to exercise the exclusive authority to make decisions as to the conduct of his defense -- including the contents of Opening Statement,

Summation, and the examination and cross-examination of witnesses; however, such decisions must be made "within the framework of the law" to be binding on his lawyer (emphasis supplied). See EC 7-7 of the Code.

8. Because of the Defendant's instructions to Petitioner following and during the discussions between them relative to Paragraph 5 and 7 above, Petitioner has notified the Defendant that he must withdraw as defense counsel in this cause. Petitioner agrees with such proposed withdrawal. The reasons cited to Defendant for such action involve Paragraph 2 of the Preamble to the Florida Code of Professional Responsibility; Ethical Considerations 1-5, 7-1, 7-5, 7-6, 7-7, 7-19, 7-25, 7-

26, 8-5 and 9-6; and Disciplinary Rules 1-102 (1)(4) and (5), 2-110(B)(2) and (C)(1)(c) and (C)(2), 7-101(B)(2) and 102 (A)(4)(5)(6) (7) and (8).

THE LAW

9. The Preliminary Statement forwarding the Florida Code of Professional Responsibility defines Disciplinary Rules as "a minimum level of conduct below which no lawyer can fall without being subject to disciplinary actions." Likewise, Ethical Considerations represent "the objectives toward which every member of the profession should strive." From EC 7-1 we learn that the duty of a lawyer, both to his client and to the legal system, is to represent his client "zealously within the bounds of the law,

which includes Disciplinary Rules and enforceable professional regulations." Further, EC 9-6 implores every lawyer "to uphold the integrity and honor of his profession; to encourage respect for the law and for the courts and the judges thereof; to observe the Code of Professional Responsibility;. . . ." Indeed, the First DCA of Florida reminds us of the "ethical considerations implicated when an attorney" acts in the way this Defendant desires Petitioner at Bar to do. Automatic Data Processing v. Seaberry, 412 So.2d 927 (1982).

10. Disciplinary Rules are mandatory in character. They are uniformly applied to all lawyers within the framework of fair trial. According to DR 1-102(A)(1), it is professional misconduct

for a lawyer to violate a Disciplinary Rule. According to sub-part (A)(5), it is also professional misconduct for this Petitioner to "engage in conduct that is prejudicial to the administration of justice."

11. When a lawyer representing a client before a tribunal "knows or it is obvious that his continued employment will result in violation of a Disciplinary Rule," DR 2-110(B)(2) makes it mandatory to withdraw from such employment. Withdrawal is permissive if such a request is because the client insists that the lawyer pursue a course of conduct that is prohibited by the Disciplinary Rules, or if the lawyer's continued employment is likely to result in a violation of a Disciplinary Rule. See DR 2-110(C)(1)(c) and (C)(2).

12. What this Defendant has requested, instructed and demanded Petitioner to do during the jury trial of this cause would, if done, cause Petitioner to knowingly engage in conduct contrary to Disciplinary Rules. This itself would violate DR 7-102(A) (8).

CONCLUSION

During every one of the 34 years of performance as a Florida trial lawyer, Petitioner -- and indeed every member of the Bar -- has been confronted with the difficult task of maintaining the Honor of the profession, integrity of the judicial system, the truth and self-respect while affording clients the

zealous advocacy of their cause within the bounds of the law, including keeping inviolate confidences and secrets. Without all of the foregoing, justice would be available only to those able to seek out, employ, and use lawyers willing to dishonor the law, dishonor the people, and dishonor themselves.

It is permissible to argue positions supported by the law or is supportable by a good faith argument for an extension, modification, or reversal of the law. To knowingly assist a client to engage in illegal conduct or counsel him on how to violate the law and avoid punishment therefor is prohibited.

Petitioner has learned that one of the greatest assets any client can have is an advocate whose personal integrity and credibility is considered by judges and juries as triers of fact. Only by a strict adherence to the Code of Professional Responsibility can a lawyer attain such stature. Petitioner rejects and is revulsed by the "words of wisdom" foisted on trial lawyers by the self-styled expert and oft-quoted lawyer and Harvard Law Professor Alan M. Dershowitz, who, on page 24 of the Spring 1984 issue of Trial Diplomacy Journal teaches defense counsel: "Let's face it, in reality it's the prosecutor's job primarily to bring out the truth and it's the defense attorney's job primarily to suppress the truth. Those are completely different

functions. If I am right, and I have never heard any defense attorney disagree with this, the vast majority of criminal defendants that we defend are guilty. Obviously, then, it's our job to make sure that the truth, the whole truth and nothing but the truth does not come out."

Petitioner cannot fulfill his obligations or adhere to his oath by accepting and then carrying out the instructions of this Defendant at this trial.

WHEREFORE, based on the foregoing, Petitioner both requests permission and notifies this Court that it is mandatory for ELLIS RUBIN LAW OFFICES, P.A. to be granted leave forthwith to withdraw from

A-14

all representation of RUSSELL J. SANBORN
in this and other causes.

Respectfully submitted,

ELLIS RUBIN LAW OFFICES, P.A.
265 Northeast 26th Terrace
Miami, Florida 33137
(305) 576-5600

BY: _____
ELLIS S. RUBIN
For the Firm

WE HEREBY CERTIFY that a true and
correct copy of the foregoing was hand
delivered to the Defendant, RUSSELL J.
SANBORN and to the Office of State
Attorney for the 11th Judicial Circuit
of Florida in Open Court, this 29th day
of April, 1985.

ELLIS RUBIN LAW OFFICES, P.A.
BY _____
ELLIS S. RUBIN

A-15

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

CIRCUIT COURT CASE NO. 84-010908

RUSSELL J. SANBORN,
Defendant/Petitioner,

v.

STATE OF FLORIDA,
Plaintiff/Respondent.

On Appeal from the Circuit Court of the
Eleventh Judicial Circuit, In and For
Dade County, Florida

PETITION FOR WRIT OF COMMON LAW
CERTIORARI

ELLIS RUBIN LAW OFFICES, P.A.
265 Northeast 26th Terrace
Miami, FL 33137
305/ 576-5600

BY: ELLIS S. RUBIN

CONTENTS

	<u>PAGE</u>
CONTENTS	i
TABLE OF AUTHORITIES	ii
JURISDICTION	1-2
STATEMENT OF THE FACTS	2-4
NATURE OF RELIEF SOUGHT	4-5
ARGUMENT	5-10
CONCLUSION	10
CERTIFICATE OF SERVICE	10

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGES</u>
Florida Rule of Appellate Procedure, 9.030(b)(2)(A)	1
Florida Rule of Appellate Procedure, 9.130(a)(1)(2)	2
Disciplinary Rule 4-101(D)(1)	2, 4
Disciplinary Rule 4-101(B)(1)	3, 4
Disciplinary Rule 1-102 (1)(1)(4) and (5)	3, 6
Disciplinary Rule 2-110 (B)(2) and (C)(1)(c) and (C)(2)	4, 5, 6
Disciplinary Rule 7-101 (B)(2) and 7-102(A)(4)(5)(6)(7)(8)	4, 5, 6
Ethical Considerations 2-32	3
Ethical Considerations 7-1, 7-5, 7-6, 7-7, 7-19 7-25, 7-26	3
Ethical Considerations 8-5	3
Ethical Considerations 9-6	3, 9
Preamble to the Florida Code of Professional Respon.	3

A-18

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA, THIRD DISTRICT

Circuit Case No. 84-010908

RUSSELL J. SANBORN,

Defendant/Petitioner,

v.

STATE OF FLORIDA,

Plaintiff/Respondent.

PETITION FOR WRIT OF CERTIORARI

ELLIS RUBIN LAW OFFICES, P.A.,
attorney of record for the Defendant
below, RUSSELL J. SANBORN, petitions for
a Writ of Certiorari to the Circuit
Court of the 11th Judicial Circuit, In
and For Dade County, Florida, the
Honorable Sidney B. Shapiro, Circuit
Judge, to review an Order Denying Peti-
tion For Leave To Withdraw As Counsel
for the Defendant below. Petitioner

seeks further relief by way of Emergency Hearing as suggested by the Trial Court in the attached Appendix.

JURISDICTION

Jurisdiction arises out of Florida Rule of Appellate Procedure 9.030 (b)(2) (A) and by Florida Rule of Appellate Procedure 9.130 (a)(1)(2). In addition, Disciplinary Rule 4-101(D)(1) of the Florida Code of Professional Responsibility governing the conduct of attorneys in Florida, is applicable herein because the Trial Court has ordered Petitioner to reveal the confidences and/or secrets of a client and the client has refused his consent thereto and a lawyer can be made to reveal such confidences or secrets "provided that a lawyer required

by a tribunal to make such a disclosure may first avail himself of all appellate remedies available to him."

STATEMENT OF THE FACTS

Petitioner is counsel of record for the Defendant Sanborn in Dade Circuit Court, Honorable Sidney B. Shapiro presiding, wherein jury trial has been set for the Defendant on several criminal charges including First Degree Murder and the State seeks the death penalty. Petitioner's entire staff of four lawyers and two secretaries devoted 42 days to preparing for this jury trial, expending about 261 hours--including the taking of over 25 depositions.

Jury trial was set to commence on Monday, April 29, 1985. Beginning on Monday, April 22, 1985, Petitioner confronted the Defendant and his mother (who retained Petitioner for the Defendant at no fee and who will be an essential witness for both sides at the trial) with facts and the results of physical evidence tests gathered through discovery; on Thursday and Friday, April 25 and April 26 respectively, the Defendant and his mother confided new and contradictory details and heretofore unknown explanations to the Petitioner and Defendant issued certain instructions to the Petitioner as to the strategy and tactics to be employed at the trial.

Because of the caveat of EC 2-32, Code of Professional Responsibility, calling for counsel "to minimize the possible adverse effect on the rights of his client and the possibility of prejudices to his client as a result of his withdrawal", and the additional prohibitions of the Code's DR 4-101(B)(1) whereby Petitioner "shall not knowingly reveal a confidence or secret of his client", Petitioner cannot further detail.

Because of the Defendant's instructions to Petitioner and his revelation of "new details" and "heretofore unknown explanations", Petitioner verbally notified Defendant and then filed a written Petition For Leave To Withdraw As Counsel for the Defendant. The

Defendant agreed and did not oppose such proposed withdrawal. The written Petition was presented to the Trial Court on the morning of April 29, 1985 and after extensive argument, the Trial Court denied said Petition For Leave To Withdraw As Counsel. The Appendix attached hereto contains a certified copy of the Petition, the Order denying same, and a transcript of the proceedings.

The reason cited to the Defendant and to the Trial Court for the requested withdrawal involved Paragraph 2 of the Preamble the Florida Code of Professional Responsibility; Ethical Considerations 1-5, 7-1, 7-5, 7-6, 7-7, 7-19, 7-25, 7-26, 8-5 and 9-6 of the Code; and Disciplinary Rule 1-102(1)(4) and (5),

2-110(B)(2) and (C)(1)(c) and (C)(2), 7-101(B)(2) and 7-102(A)(4)(5)(6)(7) and (8) of the Code.

During oral argument on the Petition For Leave To Withdraw, the Trial Court on pg. 31 of the transcript ordered Petitioner to divulge the conversations between the Petitioner and the Defendant which caused the Petitioner to ask to withdraw. In response, Petitioner read to the Trial Court Disciplinary Rule 4-101 of the Code of Professional Responsibility which prohibits a lawyer from knowingly revealing a confidence or secret of his client unless the client consents thereto or if required by a tribunal to make such a disclosure. On pg. 32 of the transcript, Defendant refused to consent

to any revelations; as a result, at pg. 35 of the transcript, the Trial Court directed Petitioner to file this proceeding in this Court and to "request an immediate emergency hearing by the Third District Court." Judge Shapiro then set the matter down for report back to him by May 2, 1985 at 9:00 a.m. On pg. 36 of the transcript, the Trial Court also agreed to include some statement in his Order Denying Petition For Leave To Withdraw to the effect that this is a matter of great public importance requiring a decision for

NATURE OF RELIEF SOUGHT

This Court may order a Writ of Common Law Certiorari to the Circuit Court reversing that Court's Order

Denying Petition For Leave To Withdraw as counsel and/or may affirm or overrule the Trial Court's Order requiring Petitioner to reveal the confidences and secrets of the Defendant. Petitioner would show that the Petition For Leave To Withdraw As Counsel should have granted by the Trial Court in that the Code of Professional Responsibility makes such withdrawal mandatory and/or permissive upon certain showings to the Presiding Judge. Because the Trial Court failed to grant said Petition, there was a departure from the essential requirement of law which would allow this Court to issue an order directing the Respondent, State of Florida, to show cause why this relief should not be granted, or such Show Cause Order could be the subject of oral argument as is

now being requested by this Petitioner on an emergency basis.

ARGUMENT

The provisions allowing or mandating withdrawal from employment by attorneys representing clients before tribunals is rendered in the Code of Professional Responsibility, Disciplinary Rule 2-110. Disciplinary Rules, unlike the Ethical Considerations, are mandatory in character; they state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action. They are uniformly applied to all lawyers.

According to DR 2-110(B)(2), it is mandatory for a lawyer to withdraw from

employment if "He knows or it is obvious that his continued employment will result in violation of a Disciplinary Rule."

And, DR 2-110(C)(1)(b)(d) and (2) and (5) allows a lawyer to request withdrawal because the client "Personally seeks to pursue an illegal course of conduct or insists that the lawyer pursue a course of conduct that is illegal or that is prohibited under the Disciplinary Rules or by other conduct renders it unreasonably difficult for the lawyer to carry out his employment effectively." Also, if the lawyer's "continued employment is likely to result in a violation of a Disciplinary Rule" or if the client "knowingly and freely assents to termination of his employment."

Accordingly, there are two (2) other Disciplinary Rules that are applicable to the Rule requiring mandatory or permissive withdrawal from employment, to wit: DR 1-102(A)(1)(4)(5) and DR 7-101(B)(2) and 7-102(A)(4)(5)(6)(7) and (8). Spelled out, these Rules provide that a lawyer shall not "Violate a Disciplinary Rule, engage in conduct involving dishonesty, fraud deception or misrepresentation, nor engage in conduct that is prejudicial to the administration of justice." Additionally, in his representation of a client, a lawyer may "Refuse to aid or participate in conduct that he believes to be unlawful, even though there is some support for an argument that the conduct is legal." And finally, a lawyer shall not "knowingly use perjured testimony or

false evidence, knowingly make a false statement of law or fact, participate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false, counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent, and knowingly engage in other illegal conduct or conduct contrary to a Disciplinary Rule."

Petitioner herein had all of the foregoing in mind when certain confidences and secrets were revealed to him by the Defendant on the eve of trial. As an officer of the Court and still bound by the Disciplinary Rules, Petitioner could not tell the Trial Court nor can he tell this Court the nature or details of why the actions of the

Defendant fulfilled the restrictions put on every Florida lawyer by the Disciplinary Rules.

Petitioner was faced with the age-old dilemma of going forward with a trial that he knew to be prejudicial to the administration of justice in many, many ways and in violation of many, many Disciplinary Rules or requesting permission to withdraw while preserving the Defendant's right to a fair trial with effective assistance of counsel. There was no choice but to request "out".

When the Trial Court demanded to know what the details were that caused the Petitioner to ask for leave to withdraw, we now argue that the Circuit

Judge went too far. It should have been sufficient that an officer of the court, sworn to uphold the Canons of Ethics and reciting in a written motion followed by oral argument as much as he could in order to not violate the Disciplinary Rule against revealing the confidences or secrets of clients, for the Court to have acted at that point to grant withdrawal. Petitioner alleged to the Trial Judge those violations sufficient to allow both mandatory withdrawal according to DR 2-110(B)(2) and to allow permissive withdrawal under DR 2-110(C)(1)(b)(c)(d) and (2) and (5). When a lawyer, sworn to uphold the Code of Professional Responsibility, attempts to do so in a written motion supported by oral argument, a Trial Court should allow that lawyer to obey the

Disciplinary Rules without jeopardizing the lawyer and/or the client any further.

By refusing leave to withdraw after the lawyer has assured the judge that, according to the Rules, it is both mandatory and permissible for the lawyer to withdraw, why should the Trial Court refuse and then require the lawyer to further breach the Code by ordering the lawyer to reveal a confidence or secret of his client without the consent of the client? Fortunately, the Trial Judge recognized the predicament of Petitioner and has allowed him this Petition For Common Law Certiorari in this Court rather than to hold the lawyer in contempt of court.

Thus, the two (2) issues for this Court to resolve based on the proceedings in the Trial Court are:

(1) When a lawyer is confronted with blatant present and future violations of the Disciplinary Rules by his client and, thus, present and future violations of the Code of Professional Responsibility by the lawyer himself if he carries out the wishes of the client on the eve of a criminal jury trial, and should the lawyer petition the Trial Judge for mandatory and permissive withdrawal, should the Trial Judge grant the Petition without further inquiry?

(2) If the foregoing is answered in the negative, may the Trial Court require the lawyer, without the consent of the client, to detail those words and acts of the client that led the lawyer to petition for withdrawal in order for the Trial Judge to decide whether to grant or deny the Petition For Withdrawal?

To answer the foregoing, this Court must refer to "the law". In this case "the law" for every licensed lawyer in the State of Florida is the do's and don't's contained in the Disciplinary Rules in the Code of Professional Responsibility. While a Trial Judge may be concerned with his calendar and a fair trial for both sides and a prosecutor with alleged tactics of delay by the Defendant, the Petitioner here is concerned with his solemn duty to uphold the integrity and honor of his profession; to encourage respect for the law and for the courts and the judges thereof; to observe the Code of Professional Responsibility; to conduct himself so as to reflect credit on the legal profession and to inspire the confidence, respect, and trust of his

clients and of the public; and to strive to avoid not only professional impropriety but also the appearance of impropriety (EC 9-6).

A lawyer, in defending a client, cannot do a number of things, as recited above, not the least of which is to violate a Disciplinary Rule nor engage in conduct involving dishonesty, fraud, deceit, or misrepresentation nor to engage in conduct that is prejudicial to the administration of justice, including the knowing use of perjured testimony or false evidence, knowingly making a false statement of law or fact, participating in the creation or preservation of evidence when he knows or it is obvious that the evidence is false nor can he counsel or assist his client in conduct

that the lawyer knows to be illegal or fraudulent nor may he knowingly engage in illegal conduct or conduct contrary to a Disciplinary Rule. Why were these prohibitions placed into the Code or "the law" for lawyers with the provision that if any of those deeds occur, they are then to be automatically considered as grounds for the lawyer to withdraw from further representation of that client? The answer is quite fundamental: if those acts were not prohibited, lawyers could indulge in dishonesty, fraud, deceit, misrepresentation and conduct that is prejudicial to the administration of justice. There would be no system of justice; there would be no need for a Code of Professional Responsibility.

CONCLUSION

At some point in his career as a trial lawyer, every member of the profession must make the decision to go along with a defense that he knows is dishonest or to petition for leave to withdraw. Petitioner is at this point and has decided to Petition For Leave To Withdraw; said Petition has been denied. As a result, Petitioner has availed himself of the appellate remedy available to him. Petitioner requests this Court to reverse and overrule the Order of the Trial Court denying his Petition For Leave To Withdraw and as part of its decision, it is further requested that this Court rule that Petitioner shall not reveal confidences or secrets of the Defendant without the consent of the

Defendant. An Emergency Hearing with oral argument is requested respectfully.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was hand delivered to: DAVID WAKSMAN, Assistant State Attorney, 1351 N. W. 12th Street, Miami, FL 33125, this 30th day of April, 1985.

ELLIS RUBIN LAW OFFICES, P.A.
265 Northeast 26th Terrace
Miami, Florida 33137
305/576-5600

BY: _____

ELLIS S. RUBIN

SUPREME COURT OF FLORIDA

FRIDAY, DECEMBER 19, 1986

ELLIS RUBIN, Esquire,

Petitioner

CASE NO. 69,048

v.

Dist. Ct. Apl.

3d DCA 85-2370

STATE OF FLORIDA,

Respondent.

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution (1980), and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla.R. App.P. 9.330(d).

MCDONALD, C.J., ADKINS, OVERTON, EHRLICH, SHAW and BARKETT, JJ., concur
BOYD, J., dissents

The Motion to Strike filed in the above cause by attorney for Respondent is hereby denied.

MCDONALD, C.J., ADKINS, BOYD, OVERTON, EHRLICH, SHAW and BARKETT, JJ., concur

A True Copy

TEST

Sid J. White, Clerk
Supreme Court of Florida

cc: Hon. Louis J. Spallone, Clerk
Hon. Sidney J. Shapiro, Judge
Hon. Richard P. Brinker, Clerk

I. Mark Rubin, Esquire
Julie S. Thornton, Esquire

SUPREME COURT OF FLORIDA

FRIDAY, DECEMBER 19, 1986

ELLIS S. RUBIN, Esquire,

Petitioner

CASE NO. 69,025

v.

FRED CRAWFORD,

Respondent.

_____/

The petitioner in the above cause has filed a Petition for Writ of Habeas Corpus, and the same having been duly considered, it is ordered that said Petition be and the same is hereby denied., and it is further

ORDERED that Petitioner's Motion to Consolidate and Amended Motion to Consolidate are hereby denied.

McDONALD, C.J., ADKINS, BOYD, OVERTON, EHRLICH, SHAW AND BARKETT, JJ., concur

A True Copy

TEST:

**Sid J. White
Clerk Supreme Court**

TC

**cc: I. Mark Rubin, Esquire
Julie S. Thornton, Esquire**

SUPREME COURT OF FLORIDA

FRIDAY, JANUARY 16, 1987

ELLIS RUBIN, Esquire,

Petitioner

CASE NO. 69,025

v.

FRED CRAWFORD,

Respondent.

_____/

**Upon consideration of the Motion
for Rehearing filed in the above cause
by petitioner,**

**IT IS ORDERED that said Motion be
and the same is hereby denied.**

**MCDONALD, C.J., OVERTON, EHRLICH, SHAW
and BARKETT, JJ., concur ADKINS, J.,
dissents**

**A True Copy
TEST**

**Sid J. White
Clerk, Supreme Court**

A-45

TC

cc: Ellis S. Rubin, Esquire
Julie S. Thornton, Esq.

IV.

THE TRIAL COURT VIOLATED
APPELLANT'S CONSTITUTIONAL
RIGHTS OF DUE PROCESS AND EQUAL
PROTECTION OF THE LAW BY
DEPRIVING HIM OF ADEQUATE
NOTICE AND OPPORTUNITY TO
RETAIN COUNSEL AND PREPARE A
RESPONSE AND BY DEPRIVING HIM
OF AN IMPARTIAL TRIBUNAL

Based on the Federal Eleventh Circuit Court of Appeals case of Sandstrom v. Butterworth, 738 F.2d 1200 (1984), Appellant here would show that he was denied due process when the Trial Judge did not furnish adequate notice or give sufficient time to Appellant to respond to the contempt charge and to retain counsel of his choice; nor did the Trial Court defer adjudication and sentencing of the contempt to another judge (an impartial Tribunal). The Sandstrom court cites Taylor v. Hayes, 94 S.Ct.

2697 (1974) and Codispoti v. Pennsylvania, 94 S.Ct. 2687 (1974), to show that basic notice and hearing are required in contempt matters. Due process must be observed, whether alleged contempt occurs during or after the trial involved.

At page 1211 of Sandstrom we find:

Adjudication before a neutral and unbiased tribunal stands as one of the most fundamental of due process rights.

* * * * *

The requirement of neutrality has been jealously guarded by this Court.

* * * * *

The court has also long recognized that, as with other due process values, use of the summary contempt power can seriously compromise the right to an unbiased tribunal.

The facts at Bar require reversal because Appellant was denied due process as required by both the Florida and U.S. Constitutions.

